FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF [1]

The following comments are submitted in reply to the briefs of respondents National Citizens Committee for Broadcasting (NCCB), the Department of Justice (the Department) and Gray Communications Systems, Inc. (Gray).

I. THE COMMISSION'S ORDER WAS LAWFUL AND RATIONAL

The FCC first adopted multiple ownership rules almost forty years ago. Since then, the Commission has amended these

[1] This reply is being filed initially in typewritten form because of the extreme difficulty of making a timely delivery to the printer under the circumstances of this case, which included receipt of the Department's brief eight days late.

rules on numerous occasions, broadening and strengthening them so as to respond to changing industry conditions and to reflect the agency's accumulating experience. Throughout this process, the Commission's objective has been to encourage diversified ownership of media in order to promote competition and diversity of expression. At the same time, where the Commission has confronted existing licensees who have proven records of service in the public interest, the Commission has not lost sight of the desirability of preserving this service. In general, therefore, the agency has applied its rules prospectively only, and has given proper attention to established records of service.[2]

After weighing the relevant policy factors in light of the record and its licensing experience, the Commission in this case decided to impose a prospective ban on co-located newspaper-broadcast combinations, but to eschew divestiture except in cases of effective monopoly. The fact that the Commission did not order across-the-board divestiture did not mean that it had departed from its long-standing view that diversification was a very important regulatory goal. It simply meant that the agency had not found sufficient justification for applying that

[2] There was no divestiture required in connection with the Commission's "overlap" rules, *see* 45 FCC 1476, 1478 (1964); its "one to a market" rules, *see* 50 FCC 2d 1046, 1075 (1975) (Note: this is the order under review, but no party has challenged this aspect of the Commission's decision); or its "regional concentration" rules, *see* 63 FCC 2d 824, 829 (1977). In addition, the agency's "7-7-5" rules were specifically designed to minimize the need for divestiture, *see* 18 FCC 288, 295 (1953). So too, in some respects, were the "chain broadcasting" rules, *see Report on Chain Broadcasting* 67-68 (1941). The original FM and TV "duopoly" rules were necessarily prospective only, since these services had not then developed, *see* 5 Fed. Reg. 2382 (1940) and 6 Fed. Reg. 2284 (1941). And of course, there was no divestiture ordered when the Commission decided to pursue its multiple ownership objectives on a case-by-case basis rather than rule; *e.g.*, in the first "newspaper-broadcast" proceeding, *see* 9 Fed. Reg. 702 (1944), and in the "top 50 markets" proceeding, *see* 22 FCC 2d 696 (1968). Thus, the only time the Commission made no distinction between existing and future licensees was when it adopted the original AM "duopoly" rules, *see* 8 Fed. Reg. 16065 (1943), and even then it afforded an opportunity for case-by-case review.

policy so as to override all other public interest considerations. Since there was nothing in the Constitution or the Communications Act that compelled the Commission to attach overriding significance to diversification under all circumstances, this decision was unquestionably lawful.

The decision was also eminently rational. The record in this proceeding did not reveal any pattern of harm from cross-ownership, but it did reveal that many newspaper-owned stations had long records of service in the public interest, and many of these station owners had community ties arising out of local residence. It was clear, moreover, that divestiture would disrupt this proven, relied upon service, and would also work a hardship on the licensees who had invested time and money in delivering this service by destroying their legitimate renewal expectancies.[3]

At the same time, while the Commission presumed that diversity could be expected to increase if there was separate ownership, it recognized that this was an "abstract" goal because, as the court later put it, there was "no guarantee" that the presumed effect would follow. 50 FCC 2d at 1078 (App. 197); 555 F. 2d at 950 (App. 373). Finally, the Commission feared that in the event of divestiture, many new owners would have to borrow large sums of money at high interest rates and

[3] The 1952 amendments to the Communications Act make it clear that such expectancies are legitimate. In that year, Congress deleted that part of Section 307(d) of the Act which provided that action on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications," and substituted a provision that renewals "may be granted * * * if the Commission finds that public interest, convenience and necessity would be served reason for the change was that the deleted portion was "neither realistic thereby." The House Report accompanying this legislation stated that the nor [did] it reflect the way in which the Commission has actually handled renewal cases," H.R. Rep. No. 1750, 82d Cong., 2d Sess., 8 (1952), and the Senate Report added that the Commission had "the right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience and necessity." S. Rept. No. 44, 82d Cong., 1st Sess. 7 (1951).

that this could possibly affect program quality.[4] In light of all this, the Commission concluded that it just did not make sense to order across-the-board divestiture.

II. NCCB AND THE DEPARTMENT HAVE NOT SHOWN THAT THE COMMISSION'S DECISION NOT TO REQUIRE ACROSS-THE-BOARD DIVESTITURE WAS ERRONEOUS

Because the Commission's refusal to require massive divestiture was both lawful and rational, it should have been upheld by the court below. That body, however, substituted its judgment and reversed the agency. Both NCCB and the Department support this action by the court.[5] In attempting to defend it, however, they commit numerous errors of fact, law and logic. A discussion of some of these errors follows.

A. NCCB adopts the position of the court below that the Commission's reasons for not ordering full divestiture were insufficient to overcome a "presumption" against cross-ownership. NCCB br. at 28–29, 45. The Commission has already demonstrated, however, that there is no such presumption against existing cross-owners. FCC Pet. br. at 33–37.

B. NCCB claims that the Commission improperly placed the burden of proof in this proceeding on "those who sought diversification over concentration." NCCB br. at 28. It is true that the Commission believed that divestiture should not be required without a strong showing of need. It is clear, however, that the Commission imposed no burden of proof on any party. Its actions were based mainly on what Professor Davis would term the finding of "legislative facts," see 1 K. Davis, *Administrative Law* § 7.02 (1958), rather than on any

[4] The D.C. Circuit, albeit in the context of trafficking, has stated that this is a legitimate concern: "Trafficking * * * may inflate the price of a station so that only wealthy individuals or businesses will be eligible transferees. *And it may lead the new ownership, in an attempt to recover its investment, to decrease the quality of its programming* while increasing the quantity of its commercials—all at the expense of public audiences." *Crowder* v. *FCC*, 399 F. 2d 569, 572, *cert. denied.*, 393 U.S. 962 (1968) [emphasis added.]

[5] The two respondents do not agree, however, as to certain other aspects of the court's decision. *See* part III, *infra*.

party's success or failure in meeting a predetermined burden.

C. NCCB contends that the Commission has "regularly" ordered divestiture in connection with its multiple ownership rules. The record clearly shows, however, that divestiture has been an exceptional remedy. *See* n. 1, *supra*.

D. NCCB objects to the Commission's taking local ownership into account as a factor weighing against divestiture. Yet in its Further Comments submitted during the course of this proceeding, NCCB correctly referred to the Commission's "long standing preference for local ownership." (App. 860). *See* letter M, *infra*.

E. NCCB also asserts that the Commission's fears of a decline in local ownership are groundless because "there is no reason to suppose that local entrepreneurs will not find television an attractive investment." NCCB br. at 33, citing 555 F. 2d at 964 (App. 421). But existing cross-owners under orders to divest, particularly those interested in swapping stations with other cross-owners, would not have to deal with these local entrepreneurs, but could sell to or swap with whomever they wished, since under Section 310(b) of the Communications Act, the Commission is barred from denying a transfer application because the public interest might be better served by someone other than the proposed transferee. Given this constraint, it was entirely reasonable for the Commission to follow the course that was least likely to result in increased absentee ownership.

F. NCCB attacks the Commission's contention that licensees who serve the public interest have legitimate license renewal expectancies by contending that "the same public interest criterion applies to both initial and renewal applications." NCCB br. at 40. In so stating, NCCB relies on certain language in *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 332 (1945). But this language was explicitly predicated on a portion of § 307(d) of the Communications Act *which has since been repealed by Congress. See* n. 2, *supra*.

G. NCCB avers that the Commission's concern for protecting "legitimate license renewal expectancies" serves only the private interests of licensees. NCCB br. at 39 n. 50. It has long

been recognized, however, that such expectancies also serve the public interest by providing licensees with the incentive to invest in quality programming rather than simply to maximize profits. The Department disagrees with NCCB on this point. Dept. br. at 49. *Cf.* n. 3 *supra*.

H. NCCB contests the Commission's statement that divestiture would disrupt proven service, claiming that this is directly contradicted by the agency's finding that the above average performance of newspaper-owned stations "was in no way shown to be the result of the fact of owning a newspaper." NCCB br. at 35, citing 53 FCC 2d 592 (App. 324). What finally counts, however, is that, for whatever reasons, these stations have performed well enough to win repeated license renewals and indeed have performed better as a class than other stations in several important areas. That such performance was not shown to be the result of newspaper ownership is immaterial.

I. The Department contends that the Commission's reasons for not ordering full divestiture "appear insubstantial," Dept. br. at 36, 51—but the Department has no special expertise in communications. Instead, the Department, which also argued for general divestiture before the Commission and the court below, is simply seeking to substitute for the agency's policy balance one more nearly to its liking.[6]

J. The Department characterizes the most significant part of the Commission's argument against divestiture—its concerns for the continuity of existing meritorious service and for fairness to existing licensees—as arguments of counsel. Dept. br. at 45–51. But in fact the special merit and the equities of existing cross-owners as a group are clearly recognized in paragraph 109 of the Commission's Second Report and Order. That paragraph shows that these concerns were not *post hoc* rationalizations, but were—from the outset—at the very heart of the Commission's decision against an order of general divestiture. 50 FCC 2d at 1078 (App. 197–198).

[6] The court below rejected the Department's arguments, which were based on antitrust policy. 555 F. 2d at 965 n. 107 (App. 427–428). The Department now seems to have abandoned this theory of the case.

K. The Department adverts to an alleged Commission claim that incumbency alone gives a broadcaster an interest in maintaining his license, Dept. br. at 46, and proceeds to demolish this straw man by quoting numerous precedents to the effect that the grant of a broadcast license confers no vested right. Later, however, the Department admits that the Commission never made any such statement. *Id.* at 49 n. 41 ("The Commission . . . speaks of renewal expectancies only for licensees that have 'given good service.'")

L. Both NCCB and the Department reiterate the reasoning of the court below that the Commission's policy on divestiture is at odds with its policy on transfers. 555 F. 2d at 963, 964, 965 (App. 420, 423, 425); NCCB br. at 33, 34, 38; Dept. br. at 42–44. But as previously stated (FCC Pet. br. at 34, 38), the Commission grants voluntary transfers because it recognizes that forced obligations would not result in conscientious service. This scarcely demonstrates, however, that its reluctance to order divestiture by licensees who want to remain in broadcasting is irrational. Indeed, it is all the more reason to prize continuity of proven service where it can be found.

M. Both NCCB and the Department refer to the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), in their attempts to prove that the Commission's order is irrational. *E.g.*, NCCB br. at 32, 45; Dept. br. at 5. But that *Policy Statement* was intended for use in choosing among *new* applicants for broadcast facilities, and the Commission has held that the statements contained therein as to the weight to be accorded various factors are inapplicable in situations involving existing licensees. *Seven (7) League Productions, Inc.*, 1 FCC 2d 1957, 1599 (1965); *Cowles Florida Broadcasting, Inc.*, 62 FCC 2d 953, 955–57 (1977), *appeal pending sub nom., Central Florida Enterprises, Inc.* v. *FCC*, No. 76–1742 (D.C. Cir.). Accordingly, it is of no significance here that the *Policy Statement* gives little credit to new applicants for local ownership *per se*, or for "past broadcast record" *at other stations*.

N. Finally, both NCCB and the Department imply that the Commission's "real" reason for not ordering widespread divestiture was its fear that selling prices would be reduced, thus

causing licensees to suffer economic loss. NCCB br. at 38; Dept. br. at 40. Simply stated, this is a red herring. The Commission never made this suggestion; in fact, its view was that licensees would *not* lose money as a result of divestiture. 50 FCC 2d at 347–348 (App. 118–119).

III. NCCB'S FURTHER ATTEMPTS TO DEFEND THE COURT BELOW ARE WITHOUT MERIT

NCCB (but not the Department) also insists that the Commission's standards for divestiture and for "*ad hoc* challenge" are irrational.[7] As to the former, NCCB's argument appears to be that the Commission purported to set a "monopoly" standard, but did not use antitrust criteria, NCCB Br. at 47. However, the word "monopoly" has meaning in contexts other than antitrust, and as the court below recognized, antitrust policy is only one component of the Commission's broad public interest mandate. 555 F. 2d 965 n. 107 (App. 427–428), citing *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959). On the latter point, NCCB, like the court below, seems to be under the mistaken impression that the Commission has limited those challenging a cross-owner's license renewal to a showing that the licensee's conduct violated the Sherman Act. *E.g.*, NCCB br. at 47 n. 62, 50–51; 555 F. 2d at 966 n. 108 (App. 428–429). In truth, however, the Commission has limited such challengers only to the extent that it will not permit them to reargue in an adjudicatory setting the question already decided in this rulemaking, *i.e.*, in what circumstances is the continued existence of co-located newspaper-broadcast combinations *per se* undesirable. The Commission has not foreclosed consideration of any acts of abuse alleged to arise out of cross-ownership. Its reference to the Sherman Act was only meant to indicate that, in addition to such other allegations of harm as might be presented, it would also consider, in the light of its broad public interest mandate, charges of economic monopoli-

[7] The Department agrees with the Commission that the court erred in vacating the limited divestiture rules. Dept. br. at 51, n. 44. The Department does not address the "*ad hoc* challenge" issue.

zation of the type proscribed by the antitrust laws. 50 FCC 2d at 1088 (App. 218).[8]

Finally, NCCB claims that "the Court of Appeals left the Commission with discretion as to the particular form any rule on remand would take." NCCB br. at 57. The Commission has demonstrated, however, and the Department agrees, that the court below did deprive the Commission of that discretion. FCC Pet. br. at 42; Dept. br. at 52. Indeed, the court has admitted that it "ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants." Opinion on Motion for Stay of Mandate, 555 F. 2d 967, 969–970 (App. 443). Accordingly, there can be no doubt that the court below has usurped an administrative function.

IV. GRAY HAS NOT SHOWN THAT THE COMMISSION'S LIMITED DIVESTITURE RULES WERE ERRONEOUS

Respondents Gray, *et al.*, who include five of the sixteen licenses affected by the Commission's limited divestiture rules, support the vacation of these provisions by the court below. Initially, Gray asserts that the Commission never gave notice that it was considering the adoption of rules based on a standard of effective monopoly. Gray br. at 9–10. But the Commission's Further Notice of Proposed Rulemaking clearly satisfied the APA, 5 U.S.C. § 553(b)(3), and in any event, the agency's 1974 memorandum opinion and order specifically invited additional comments on whether divestiture should be limited to markets "with a specific number of separate media voices." 22 FCC 2d 763, 769 (App. 129).

Gray also argues that the Commission did not consider the adverse consequences of divestiture in the cases of those licensees ordered to divest. Gray br. at 11, 17–18. But of course,

[8] Newspaper cross-owners are also subject, of course, to the Commission's other multiple ownership rules and policies. Moreover, the Commission has retained diversification as a factor weighing in favor of a new applicant challenging an incumbent licensee. In any case, though, only the Commission's newspaper-broadcast rules are now before this Court. The agency's treatment of adjudicatory license renewal challenges is not at issue.

the Commission did not consider these adverse consequences in all cases. On balance, however, it determined that where there was not even one other voice which could reasonably be expected to compete effectively with a cross-owner and to provide a "juxtaposing" of views on local issues, divestiture was the course of action that would best serve the public interest. 50 FCC 2d at 1081, 1083 (App. 203–207); *see generally id.* at 1078–1087 (App. 196–214).

* * * * * * *

For the reasons stated above and in its other pleadings before this court, petitioner again requests that its orders be affirmed and the judgment of the court below reversed.

Respectfully submitted,

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